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No. 03-475

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SIERRA CLUB

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QUESTIONS PRESENTED

Because this Court is obligated to consider jurisdictional questions first, and because respondents believe that the questions presented by petitioners do not properly state the issues before this Court, respondents have re-ordered and re-stated the questions presented as follows:

1. Did the court of appeals correctly conclude that it lacked appellate jurisdiction over the purported appeal under 28 USC §1291 and the petition for mandamus filed under 28 U.S.C. § 1651, where (1) petitioners made no claim of absolute or qualified immunity from suit, (2) petitioners raised no claim of executive privilege or any specific objections to any discovery request, and (3) petitioners sought interlocutory review of the order of the district court refusing to dismiss the cases and directing that limited discovery be permitted to resolve the factual questions that underlie respondents' legal claims?

2. Did the district court correctly refuse to dismiss these Federal Advisory Committee Act cases brought under the Administrative Procedure Act and the mandamus statute prior to discovery where it concluded that the factual record put forth by petitioners was insufficient to decide the merits of the claims presented?

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner-defendant Vice President Richard B. Cheney, Judicial Watch, Inc., and Sierra Club were plaintiffs in the district court and appellees-respondents in the court of appeals. Sierra Club has no parent corporation, and no publicly held corporation owns 10% or more of Sierra Club.

Other parties who were defendants in the district court and petitioners-appellants in the court of appeals and this Court are the National Energy Policy Development Group, Joshua Bolton, Larry Lindsey, and Andrew Lundquist. The following persons are additional defendants in the district court, but were not appellants or petitioners in the court of appeals or this Court: Paul O'Neill, Gail Norton, Ann M. Veneman, Donald Evans, Norman Mineta, Spencer Abraham, Colin Powell, Joseph M. Allbaugh, Christine Todd Whitman, Patrick H. Wood, III, and Mitchell Daniels. The following persons were defendants in the district court, but were dismissed as defendants before any proceedings in the court of appeals: Mark Racicot, Haley Barbour, Kenneth Lay, and Thomas Kuhn.

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STATEMENT OF THE CASE

The Statement in the petition accurately describes the basic events that occurred in the courts below. However, it omits a number of significant matters that demonstrate why there was no appellate jurisdiction in the court of appeals (and hence there is no jurisdiction in this Court), and why the issues that petitioners contend are presented on the merits are not the issues decided by the lower courts and hence are not properly before this Court.[1]

This petition involves two cases raising claims under the Federal Advisory Committee Act, 5 U.S.C. App. 1 ("FACA"). That law requires, *inter alia*, that committees established by the President or federal agencies to obtain advice must meet certain formal procedural requirements and must conduct their business in public, subject to certain exceptions. There is a specific exclusion in FACA for committees composed entirely of federal officers and employees, and it was this exception on which petitioners relied in claiming that the National Energy Policy Development Group ("NEPDG" or the "Task Force") was not subject to FACA.

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[1] The petition does not contain a page listing the parties to these consolidated cases, and the caption lists only Vice President Richard B. Cheney as a petitioner. On page 1 the petition states that it is filed on behalf of the "former National Energy Policy Development Group (NEPDG) and former members and staff of the NEPDG." Thus, petitioners apparently concede that these cases may continue against the other defendants. Although the remaining defendants are technically respondents in this Court, this brief will use the term "respondents" to refer to plaintiffs Judicial Watch and Sierra Club.

There is no dispute that the order creating the Task Force and the list of members set forth in its final report named only federal officials. It is also undisputed that, when these complaints were filed, the law was clear in the District of Columbia Circuit that the formal membership of an advisory committee is not conclusive on the applicability of FACA's exemption for committees composed entirely of federal officials. *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"). Under *AAPS*, a plaintiff is entitled to discovery to determine whether, as a factual matter, non-federal officials participated as *de facto* members in the work of an advisory committee and/or any of the sub-groups that were created to help carry out its mission.

Prior to filing its lawsuit, respondent Judicial Watch wrote to the Office of the Vice President, citing news reports, and claiming that private persons from the energy industry had participated extensively in the work of the Task Force and therefore that the Task Force had operated in violation of FACA. The Counsel to the Vice President responded with a brief letter denying the factual allegations, but providing no specifics to support that position. Judicial Watch then filed suit in the United States District Court for the District of Columbia alleging that the Task Force had operated in violation of FACA, asking for a declaratory judgment to that effect, and seeking an order that the Task Force and the other defendants comply with FACA's requirements, including that the Task Force make its records public to the extent required by law.

Several months later, respondent Sierra Club filed a similar suit in the Northern District of California, which was transferred to the District of Columbia and consolidated with

the Judicial Watch case. The Sierra Club complaint specifically alleged that non-federal officials participated extensively in sub-groups that the Task Force had established to assist it in gathering information and making recommendations. Because the sub-groups were not mentioned in the letter from Judicial Watch, the letter from the Counsel to the Vice President did not mention sub-groups or deny that their participants included non-federal personnel.

All of the defendants moved to dismiss the complaints in their entirety under Rule 12(b)(6). They specifically argued that "fundamental separation of powers principles would bar application of FACA to the [Task Force] or the Vice President," and that any "discovery would raise the same constitutional issues as would application of FACA." Reply on Motion to Dismiss at 25. At no time in the district court did petitioners attack the continued validity of *AAPS*; instead they argued that *AAPS* supported the proposed discovery bar. Reply at 27. They did not invoke any special or heightened pleading rules or claim any constitutional immunity from suit. Their focus at the motion to dismiss stage was on arguing that any claim that plaintiffs might have must be decided solely on the basis of the President's Memorandum establishing the Task Force, without any discovery. Reply at 9-11. [2]

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[2] The operative Judicial Watch complaint at the time that the motion to dismiss was denied was the second amended complaint, which had 11 attachments, totaling almost 50 pages, including two transcripts of interviews on the subject of the Task Force with the Vice President. Appendix in the Court of Appeals (C.A. App.) at 27-101. Thus, the assertion in petitioners' first question presented that the case was based on "unsupported allegations" is, at best, the opinion of petitioners as to the probity of those attachments.

After extensive briefing and oral argument, the court issued a careful and lengthy opinion, declining to dismiss the complaints. The district court squarely rejected the claim that discovery alone would violate separation of powers. Pet. App. 117a-119a. It agreed with the Government that FACA did not provide for an implied cause of action (*id.* at 77a) and that the Vice President was not an agency and hence could not be sued under the APA, although the Cabinet officers who were also defendants could be. *Id.* It also agreed that the private individuals named in Judicial Watch's complaint were not proper defendants in a FACA case. *Id.* at 121a. However, the court allowed the mandamus action to proceed against the Vice President, as well as against the other defendants, because the mandamus statute, 28 U.S.C. § 1361, is not limited to agency officials and because the presence of the Vice President was needed to assure that adequate discovery could be had and, if plaintiffs prevailed, meaningful relief could be obtained. *Id.* at 96a-97a.

The court also recognized that, in some situations, compliance with FACA for a committee chaired by the Vice President might violate principles of separation of powers. Because this was not a case where the plaintiffs' claims directly threatened the powers of the President (the advice had already been rendered and the only issue was whether the Task Force complied with FACA), the district court concluded that the separation of powers issues should be decided based on more facts than were currently before the court and that at least some discovery was needed on the threshold factual question of whether private persons had participated in the work of the Task Force or its sub-groups. In addition, the court noted, discovery might show no factual basis for the claims, in which case there would be no need to reach the separation of powers issues. *Id.* at 119a.

The district court did not simply turn the plaintiffs loose to embark on whatever discovery they chose, but stated that any discovery will be "very tightly-reined." *Id* at. 118a. Thus, in its July 11, 2002 order, the court directed plaintiffs to submit a discovery plan in eight days, gave defendants a week to reply, and set a hearing for August 2, 2002, to consider any objections defendants had to plaintiffs' proposed discovery. *Id.* at 123a. Instead of merely submitting a plan for discovery, which would then have to be fleshed out, plaintiffs also submitted a joint set of nine interrogatories and eight requests to produce documents, the operative portions of which are appended to this opposition. Add. 1a-6a. The discovery is mainly directed to gathering information on the threshold issue of whether private parties participated in the Task Force and its sub-groups, none of which would necessarily require production of deliberative materials of the kind normally exempt from public disclosure.

Petitioners' response was the same as before: no discovery was appropriate. They did not object to the plan or to specific interrogatories or requests to produce on the ground that they would require the production of confidential information of any kind, let alone did they assert any privilege claim – executive or otherwise – as to any of the discovery. Nor did they then file an appeal, seek a writ of mandamus in the court of appeals, or ask the district court for a certification under 28 U.S.C. § 1292(b): they simply maintained the same position that they had urged in their motion to dismiss.

Not surprisingly in the face of the same opposition that it had previously found wanting, the district court at the conclusion of the August 2nd hearing approved the discovery

plan and permitted plaintiffs to serve their proposed discovery. Then, a month later, when it came time to answer or object, petitioners moved for a protective order, applicable to plaintiffs' entire discovery. Again, the objection was across-the-board, and there was no claim of executive privilege or contention that any particular request was overbroad or otherwise improper. That motion also was denied, although the district court offered to review materials – or even a privilege log – in camera. C.A. App. 283-284.

Once again petitioners refused to respond or raise specific objections. This time, however, petitioners announced that they were going to the court of appeals, which they finally did on November 12, 2002, when they filed a notice of appeal and a petition for mandamus, both premised on the argument that the district court should have decided the case solely on the record that petitioners presented. They also asked for a stay of discovery, even though they had not answered or objected to a single item of discovery or even prepared a privilege log. The district court denied the stay motion, but extended the time to reply once again to allow petitioners to seek relief from the court of appeals, which granted an administrative stay on December 6, 2002. However, the district court continued to show deference to petitioners' contentions by declining to enter the sanctions orders requested by plaintiffs based on defendants' refusal to respond or object specifically for more than two months after responses were due. In addition to seeking mandamus and filing an appeal, petitioners also asked for certification under 28 U.S.C. § 1292(b), which the district court denied on November 27, 2002.

After hearing oral argument, the court of appeals dismissed the appeal and writ of mandamus for lack of

jurisdiction on July 8, 2003, almost a year after the district court had denied the motion to dismiss. Petitioners had asserted jurisdiction in the court of appeals under 28 U.S.C. § 1291, relying on the collateral order doctrine, and under mandamus, using the All Writs Act, 28 U.S.C. § 1651, claiming that the district court's orders permitting discovery fell within those exceptions to the final judgment rule. The court of appeals rejected petitioners' arguments, finding that no exception to the final judgment rule applied in these circumstances.

In particular, the court rejected the claims that, in the absence of immediate appellate review, petitioners would be faced with an intolerable choice of complying with discovery that they believed was improper – which would moot the controversy – or being held in contempt for failing to do so. The court of appeals correctly noted that, given the stage of discovery below, petitioners were faced with no such choice at this time, if they would ever be placed in such a position. Thus, the court of appeals properly concluded that the attempt to obtain review of the district court's ruling was premature and that it had no jurisdiction to entertain the appeal.

Judge Randolph, in dissent, sided with petitioners, albeit for a reason that they had never raised in the district court or in the court of appeals. He argued that the decision in *AAPS* was wrong and should be overturned, in which case the district court would be required to dismiss the complaint. He did not explain how the court of appeals could surmount the final judgment rule to achieve that result, let alone how this panel could overturn a decision of a prior panel. Nor did he dispute that, if *AAPS* were still good law, the district court

had acted properly in allowing the discovery that plaintiffs propounded.

Petitioners sought rehearing en banc, which was denied. They then asked for a stay pending review in this Court. Respondents did not oppose the stay, and they agreed not to seek to move discovery ahead provided that the petitioners filed in this Court by September 30, which they did. The panel majority denied the stay because it could find no substantial harm even from the reactivation of discovery in the district court and because a stay was unnecessary given respondents' representations that they would not proceed below until this Court acted. Order of September 30, 2003.

REASONS FOR DENYING THE WRIT

The petition asks this Court to decide a number of far-reaching constitutional and statutory questions. Whether those questions would someday warrant review by this Court is of little moment because the court of appeals correctly recognized that it lacked jurisdiction over them, and hence this Court is also without jurisdiction. *Swint v. Chambers County Comm'n,* 514 U.S. 35 (1995). To understand why the court of appeals lacked jurisdiction over these premature attempts to obtain appellate review, it is necessary to focus on the nature of the claims in this case and the alleged errors that petitioners contend warranted review below and in this Court.

However, before turning to the specific reasons why the petition should be denied, it is appropriate to place the filing of the petition in proper perspective. As a result of petitioners' efforts to avoid discovery in the district court by seeking review first in the court of appeals and now in this

Court, it will be at least sixteen months after petitioners' motion to dismiss the complaints was denied before they are required to respond or object to a single interrogatory or request for document production. In the meantime, the facts surrounding how the recommendations of the Task Force were prepared, and whether that was done in compliance with FACA, have remained secret, while the energy legislation for which the Task Force developed its recommendations is moving through Congress and may well be signed into law before discovery even begins. In short, petitioners have succeeded, through premature appeals and now a writ in this Court, in delaying the Task Force's day of reckoning. Those tactics should now come to an end, and the Court should deny the petition.

I. THERE WAS NO APPELLATE JURISDICTION IN THE COURT OF APPEALS AND HENCE NONE IN THIS COURT.

These two cases allege that the Task Force was operating as an advisory committee under the Federal Advisory Committee Act, but did not comply with that act. Respondents contend that, even if only federal officials were formally designated as members of the Task Force and its sub-groups, the exemption for advisory committees comprised only of federal officials would not be applicable because the Task Force and its sub-groups developed their recommendations with extensive participation by non-government personnel. It is undisputed that, under the law of the District of Columbia Circuit, if those factual claims were correct, the FACA exemption would be lost.

Petitioners moved to dismiss the complaints under Rule 12(b)(6), on a variety of theories. However, the one on

which petitioners focus their petition is the contention that the district court was required to decide the issues presented without allowing respondents any discovery. No case supports such a position, *AAPS* contradicts it, and this Court's decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), makes it clear that a reviewing court is not required to decide a case on the kind of inadequate record presented here.

After extensive briefing and oral argument, the district court entered an order on July 11, 2002, granting certain aspects of the motions to dismiss, but denying the remainder, thereby permitting these cases to go forward. The opinion accompanying that order made it perfectly clear that the district court was going to allow discovery on what it saw as the factual claims presented by these cases. In doing so, it rejected the Government's legal arguments that the Vice President was not a proper defendant in these suits, that the cases could not proceed under the APA or under the mandamus statute, 28 U.S.C. §1361, and that any discovery would necessarily violate separation of powers. To implement that opinion, the July 11 order directed plaintiffs to submit a discovery plan eight days later, gave defendants a week to reply, and set a status conference for August 2 to discuss the discovery plan and possible additional briefing on "any claims of privilege asserted by the government." Pet. App. 123a.

Thus, on July 11, three things were clear: any claims that defendants had that the district court should have dismissed the case at that stage had been finally rejected; discovery of defendants was inevitable, although the scope of that discovery was yet to be determined; and claims of privilege with respect to specific discovery requests would be

entertained as they arose. Nothing that happened in the district court after that date altered any of those propositions in any way. Although defendants opposed every effort that plaintiffs made to move discovery ahead, their objections were identical to the ones that they had previously raised – no discovery was proper and the burden of even having to respond with specific claims of privilege would violate principles of separation of powers. There was never a claim that any particular item of discovery was particularly invasive, but only that no discovery at all was proper. That is, in essence, the first question in the petition, which objects to any form of discovery in this case. To be sure, the district court issued subsequent orders in connection with the discovery proceedings, but the basis of the Government's claims never changed – no discovery is permitted in this case. And the answers of plaintiffs and the district court also remained unchanged – discovery is needed to resolve the legal issues.

The proper characterization of the question presented is essential for several reasons. First, it takes this case out of the group of cases on which petitioners rely in which review was sought to prevent a lower court from violating specific privileges for specific documents. Second, it demonstrates that petitioners' basic objection – that any discovery would violate separation of powers – was rejected in the July 11th order and that nothing changed after that. Third, their claim is, at bottom, one that the complaints should have been dismissed, either on the merits under FACA, or because the Vice President (and perhaps the other petitioners) have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory.

The Court of Appeals Lacked Jurisdiction Under Section 1291.

Given the theories on the merits on which petitioners rely in this Court, the operative order was the order of July 11, 2002, denying the motion to dismiss and directing that discovery proceed. No matter how these defenses (or claims) are characterized, their substance is that these cases should not have been permitted to proceed any further, and that the district court erred on July 11, 2002, in not dismissing them. Therefore, even if the collateral order doctrine applies (which as we explain below it does not), petitioners' appeal was too late. The time for such an appeal under FRAP Rule 4(a)(1)(B) was sixty days, which expired on September 9, 2002. No notice of appeal was filed until November 12, 2002, more than 120 days after July 11. The fact that the appeal here was based on the collateral order doctrine does not render the 60-day time limit inapplicable. Rule 4(a) applies whenever there is an appeal under section 1291, including an appeal of a collateral order, which is simply one kind of final order under section 1291. *See e.g., Weir v. Propst,* 915 F.2d 283, 286 (7th Cir. 1990), *cert. denied,* 514 U.S. 1035 (1995); *United States v. Moats,* 961 F.2d 1198, 1203 (5th Cir. 1992); C. Wright, A. Miller, & E. Cooper, 15A Federal Practice & Procedure § 3911 at 357 (1992).

Nor is this a proper case for the collateral order doctrine, even if the appeal had been timely. First, the nature of the relief sought is immunity from discovery, which in this context means total immunity since it is impossible to challenge petitioners' factual claims without discovery. Yet it is noteworthy that the petition does not cite any absolute or qualified immunity cases, such as *Mitchell v. Forsyth,* 472 U.S. 511 (1985), or *Nixon v. Fitzgerald,* 457 U.S. 731 (1982),

which provide the kind of relief that petitioners seek – dismissal of the entire case, and which provide for an immediate appeal if such a defense is rejected. Indeed, they dare not request that kind of constitutional immunity because it is so obviously inapplicable to the statutory claims in this case, in which the district court simply denied a motion to dismiss.

Second, there is no basis for any blanket claim of vice-presidential immunity from discovery in federal court. That is the teaching of *Clinton v. Jones*, 520 U.S. 681 (1997), another case missing from the petition, where this Court rejected claims by a sitting President, in a case based on a claim unrelated to his official duties, that he was immune from all civil discovery. Surely, if there is no blanket bar to discovery in that situation, the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment. Furthermore, none of the collateral order cases permits an appeal when, as here, the claim is solely one of immunity from all discovery.

In this Court, as below, petitioners place principal reliance on *United States v. Nixon,* 418 U.S. 683 (1974), to support appellate jurisdiction. But that reliance is misplaced, as the court of appeals properly concluded. There are four principal distinctions between *Nixon* and this case that explain why even a timely appeal from the July 11th order (or from any of the orders entered thereafter) would not fall within the *Nixon* rationale. First, the party opposing discovery in *Nixon* had already raised a procedurally proper claim of executive privilege as to the specific tapes being sought, and that claim had been definitively rejected by the

district court. Here, no claim of privilege for any document or for any answer to any question has been raised, let alone rejected. Second, the person seeking review in *Nixon* was not a party to the underlying proceeding before the grand jury, and therefore there would be no other "final judgment" against him from which he could take an appeal, as ordinary litigants can in civil cases like this in which the persons subject to discovery are parties to the proceedings.

Third, the only other step that arguably could have been required in *Nixon* before an appeal would have been proper was to hold the President in contempt, but in this case the district court is at least several steps away from any possible contempt ruling. Thus, petitioners may choose to answer questions and produce unprivileged documents that may satisfy plaintiffs, or the district court may conclude that such production constitutes sufficient compliance in this case. Or petitioners may file claims of privilege that the district court may sustain, or the privilege log or an *in camera* inspection may reveal to the district court that the information sought is not relevant or may be withheld for some other reason.

Fourth, petitioners present this case as if the trial judge had already rejected all of petitioners' claims applicable to particular documents or interrogatories and issued an order compelling petitioners to respond. They further assume that the judge would force the Vice President and perhaps others to comply with the order or be held in contempt, with jail and/or daily fines to follow, as day follows night. And if they wished to avoid contempt, they would be compelled to comply, thereby mooting any claim that the discovery order was improper because the cat would already be out of the bag.

But the Federal Rules do not limit a trial judge's options in that way, nor do they result in procedures that deny parties resisting discovery a meaningful opportunity to obtain appellate court review of allegedly unlawful discovery orders. Rule 37(b)(2) provides for a wide range of sanctions short of contempt, such as (A) ordering that certain facts be taken as having been established for purposes of the case; (B) precluding a disobedient party from opposing certain claims or introducing certain evidence; or (C) striking parts of the pleadings or rendering a default judgment. Although respondents have asked the district court to impose sanctions against petitioners for their recalcitrant refusal to comply with discovery, the district court has to date declined to do so. More importantly, it is nothing short of premature speculation that the district court would have chosen the contempt option in lieu of other sanctions, had the discovery proceedings reached that point.[3]

If one of the lesser sanctions were chosen, the worst that could happen to petitioners is that the district court would enter judgment that defendants had violated FACA and order them to comply by making certain disclosures. Even then, the status quo would probably be maintained because either the district court or the court of appeals would probably stay the disclosure portions of the order pending appeal. At that time, there would be an appealable final judgment, from which petitioners could ask the court of appeals to review the previously non-reviewable order of

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[3] Even in *Nixon* where the only feasible remedy was contempt, this Court made clear that ordinarily it would require a person refusing to comply with a discovery order to be held in contempt, but that insisting on such a requirement there would be "peculiarly inappropriate due to the unique setting in which the question arises." 418 U.S. at 691.

July 11, 2002, as well as any other interlocutory orders, such as any sanctions under Rule 37(b), that become appealable along with the final judgment. Thus, far from denying petitioners an appeal over discovery and other orders that they consider unlawful, the district court has provided more than ample procedures that assure petitioners will ultimately have the right to one appeal, from a final judgment, that includes any otherwise non-moot order made along the way. By contrast, petitioners have interrupted this orderly procedure by seeking writs of mandamus and interlocutory appeals of non-final orders, instead of either answering the discovery or standing on what they believe to be the correct view of the law and allowing the court of appeals to decide whether they are right once a final judgment has been entered against them.

To be sure, if they follow the path of insisting on their "no discovery" position, and the district court enters a preclusion order, petitioners would run the risk that the court of appeals might disagree with them on the discovery question. In that case they would lose the opportunity to answer the discovery and then perhaps prevail on the merits. But that is the inevitable consequence of the final judgment rule and the operation of Rule 37(b) in cases where a party refuses to respond to discovery, whether on principle or for any other reason. Petitioners are represented by sophisticated counsel, and they will surely be advised of the consequences of their choice once the case is back in the district court. But if they decide to answer the discovery, and not continue their massive resistance, the choice to forgo their appellate rights down the road will be theirs. Unlike *Nixon*, it is not "now or never," let alone is there any immediate or even any realistic possibility that the Vice President or any other defendant will be held in contempt of court for failing to respond to this

discovery. Therefore, even if the appeal here had been timely, there would be no basis to apply the collateral order doctrine to rescue petitioners from the choices that they will have to make in the district court.[4]

There Was No Mandamus Jurisdiction in the Court of Appeals.

The court of appeals also lacked mandamus jurisdiction over petitioners' attempt to obtain interlocutory review of the district court's refusal to dismiss the complaint before allowing respondents any discovery. Once again, as with the attempt to use the collateral order to obtain an appeal, mandamus was either too late or premature. To the extent that mandamus might lie over a denial of a motion to dismiss, the writ should have been filed promptly after the July 11, 2002 order was entered and not months later. Although FRAP Rule 4(a) does not apply to mandamus petitions, the absence of a specific limitation period for mandamus relief does not permit petitioners to evade the 60-day rule by recasting their appeal as a writ of mandamus. *Helstoski v. Meanor*, 442 U.S. 500, 508 n. 4 (1979).

Prohibiting such evasion is particularly appropriate here where, if any review is proper at this stage of the case, it is because the order being reviewed is similar to orders falling within the collateral order doctrine. *Id.* at 505-06 (mandamus available only when there is no other practical

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[4] The only other appellate case cited by petitioners to support appellate jurisdiction is *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In that case, however, there was a final judgment entered in the district court, and hence it has no bearing on whether the court of appeals had appellate jurisdiction here where all orders are interlocutory.

remedy). Petitioners did not seek mandamus on the ground that the lower court ordered them to provide specific information that they contended was privileged. Rather, they sought a form of discovery immunity – a claim that would be reviewable at this stage only if its denial were a collateral order, which is subject to the 60-day rule.

Even if the 60-day rule did not apply, petitioners' mandamus claim should be barred by laches. *In the Matter of the Eastern Cherokees,* 220 U.S. 83 (1911). For over four months after petitioners knew that discovery was inevitable, they continued to delay and obstruct the proceedings in an effort to postpone having to respond or even object to specific items of discovery. So successful were they that, more than a year after they were supposed to provide documents and answers to interrogatories, they have not produced a single piece of paper, responded to a single question, or even provided a single specific objection to any of respondents' discovery requests. Instead, they waited four months before taking an appeal that, on petitioners' theory, was as ripe on July 11, 2002, as it would ever be. It has always been clear to all parties and the lower courts that this case is about access to information about what roles private parties played on the Task Force, and by these tactics, petitioners have significantly thwarted the efforts of respondents to make that information public. If there were ever a case for applying laches to a request for a writ of mandamus to the district court, this is surely it.

Finally, if this dispute were truly about discovery and not a claimed immunity, there would still be no basis for mandamus in the court of appeals because there is no order compelling specific discovery that might arguably form the basis for a writ of mandamus. Petitioners cite no authority

for the proposition that blanket objections to discovery are properly the subject of writs of mandamus in the courts of appeals or of claims of immunity of any kind, let alone the unique variety asserted here. Even if mandamus might be available to protect against the violation of a claim of privilege with respect to a specific disclosure, which has not yet occurred, it has never been invoked in this situation in which petitioners seek to use the writ as an end-run on the prohibition against interlocutory appeals of discovery orders. At the very least, the failure of the district court to interrupt discovery before the defendants have even filed their objections is not such a violation of a clear right of petitioners as to warrant the use of mandamus, particularly since petitioners will be able to obtain full appellate review of their legal claims after entry of a final judgment in the district court.

II. THE MERITS QUESTION PRESENTED DOES NOT WARRANT REVIEW.

Even if the court of appeals (and therefore this Court) had jurisdiction to consider the merits of petitioners' claims of error, the petition seriously overstates the merits of petitioners' defenses as applied to the facts of this case. Petitioners' assertion that allowing this case to proceed will cause serious harms to separation of powers interests is in error for four principal reasons.

First, this case has not proceeded beyond the motion to dismiss stage, in contrast to *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), where this Court reviewed a final judgment based on cross-motions for summary judgment. Under decisions of this Court such as *Morrison v. Olson,* 487 U.S. 654 (1988), and *Nixon v. General Services*

Admin., 433 U.S. 425 (1977) – neither of which the petition cites, although the district court relied on both of them, Pet. App. 100a – separation of powers issues such as these require a balancing of all the relevant considerations, which cannot be properly done on such an incomplete record.

Second, the persons whose claimed constitutional powers are being impeded are the Vice President and lower level White House officials, not the President. None of them has any enumerated powers under Article II of the Constitution that are in any way threatened by this lawsuit. The Task Force that the Vice President chaired was created to advise the President in carrying out his constitutional duties, but it is difficult to understand how requiring the Vice President and the other defendants to respond to the allegations of this lawsuit, long after that advice has been rendered, will impede the Vice President's ability to render advice, now or in the future. To the extent that such a claim is made, it is surely a novel one because no case cited by petitioners involves such a claim on behalf of a Vice President or the other petitioners, nor does any case support such a claim as a means of avoiding all discovery.[5]

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[5] While the discovery matters were being litigated in the district court, petitioners sought outright dismissal of the claims against Andrew Lundquist, the Executive Director of the Task Force, who had been sued by Sierra Club in his official capacity, on the ground that he was no longer a federal employee. As Executive Director, Lundquist had possession of documents that bore directly on the factual issues presented, as well as personal knowledge of what took place. Had the government moved to substitute his successor under F.R.C.P. 25(d)(1), respondents would not have objected, but that is not what was sought. Indeed, the continued presence in the case of Lundquist or his successor should have been welcomed by petitioners since it would have enabled them to suggest that the Vice President did not have to respond personally

(continued)

Third, *Public Citizen* involved a claim that the President, through his Attorney General, was *utilizing* advice from a committee established by the American Bar Association in connection with his judicial appointments. By contrast here, the President himself *established* the energy Task Force, bringing into play a different prong of FACA than was at stake in *Public Citizen.* This difference is significant because the separation of powers balance is quite different when the President, as is alleged here, chooses to establish an advisory committee, and then agency heads and other executive branch officials whom he has assigned to the committee do not comply with FACA. At the very least, the differences are such that petitioners' contention that this case is controlled by *Public Citizen* (even if the three-Justice concurring opinion could be treated as a majority ruling) cannot be accepted at face value.

Fourth, the claim that the district court erred in allowing respondents any discovery in this case is unsupported by any authority relied on by petitioners, in large part because there is no appellate case with facts like this or in which the Government has taken such an extreme position on discovery. According to the Government, the case must be decided on the administrative record, which, it contends, consists solely of the order creating the Task Force, the final report, and a letter from the Counsel to the Vice

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to the interrogatories and document production requests, unless respondents could show some reason why the staff of the Task Force could not do so. Thus, if there are separation of powers issues in this case, the dismissal request by petitioners served to increase, not alleviate, them.

President. The first two documents do no more than identify the persons who were official members of the Task Force, a matter on which there is no dispute. Those documents do not respond to the claim that the Task Force and its subgroups included additional, fully participating non-government members, which would make them advisory committees under FACA. The other item is a reply to a demand letter from Judicial Watch, and it does no more than state petitioners' conclusion that FACA is inapplicable because only federal officials were members of the Task Force.[6]

Petitioners insisted below that the district court had to decide this case, under either the APA or mandamus, solely based on these three pieces of evidence. They contend that the three items constitute the "administrative record" from which the district court must decide the factual issue of

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[6] Petitioners also point to 35,000 pages of documents originally released in separate FOIA suits and later produced in these cases by the agency defendants, plus an affidavit dated September 3, 2002, from Karen Knutson, who was the Deputy Director of the Task Force. C. A. App. 257-262. Neither the documents nor the affidavit were submitted by defendants in support of their motion to dismiss, and hence they cannot be the basis of any claim of error in this Court. Moreover, the documents contain substantial redactions and do not purport to show the workings of the Task Force and its sub-groups. As for the Knutson affidavit, it was untested by discovery and hence could not be the basis for a summary judgment motion under Rule 56, let alone a motion to dismiss under Rule 12(b)(6). Furthermore, the Knutson affidavit was submitted primarily to avoid discovery and was coupled with a request to allow the defendants to move for summary judgment. Since petitioners had chosen not to file such an affidavit and seek summary judgment initially, the district court was acting well within its discretion in not giving defendants a second try before any discovery could take place. In addition, Ms. Knutson claimed no personal knowledge of the activities of the sub-groups, which were a major focus of the Sierra Club complaint.

whether non-federal personnel were, in practice if not in name, members of the Task Force and its subgroups. If that theory were sustained, it would insulate all claims of non-compliance with FACA from any discovery by allowing a defendant to decide for itself what constitutes the administrative record. Indeed, on that theory, if the Task Force had chosen not to list its members in the final report, and its counsel had chosen not to respond to the letter from Judicial Watch, the entire record would consist of the order creating the Task Force, and nothing that happened after its creation would have been relevant.

It is important to note that the principal discovery that plaintiffs are now seeking is the documents that were produced as part of the operation of the Task Force and that would show whether non-government persons participated extensively in its work. In that sense, the intrusion on normal government decisional processes by the discovery sought here is less than what was required in *Citizens to Preserve Overton Park v. Volpe*, *supra,* where federal officials had to create new documents and/or give testimony, explaining what they had done, and on what basis, regarding the decision under challenge there. 401 U.S. at 420. Surely, if documents exist that show who attended what meetings and who participated in drafting the report and recommendations of the Task Force, they would be highly relevant on these questions and would not be burdensome to locate or produce. In a situation like this, where there is no "docket" of any kind, there is no authority that allows a federal defendant to define the administrative record in a way that makes meaningful judicial review impossible. At the very least, this issue is not one that this Court should consider on this record, especially when the court of appeals, which sees scores of administrative law cases each year, has not passed on it.

There is one final reason why the petition should be denied. Because the petition has been filed only on behalf of the Vice President, the Task Force and its former staff members, *see, supra,* note 1, even if all the relief sought were granted, the cases would continue against the remaining defendants, who are all agency heads and can be sued under the APA and mandamus. Discovery would proceed against them because, presumably, they also have copies of at least some documents showing who was invited to and attended various meetings and who worked on and/or saw various drafts of Task Force documents, including recommendations. Since that discovery will continue no matter what this Court were to say about the right to sue the Vice President (and perhaps even members of his staff), nothing would be gained – except even further delay – if this Court should grant the petition. Coupled with the lack of finality in the district court, the posture of this case makes this a singularly inappropriate vehicle for reaching out to explore the issues that petitioners seek to have resolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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ADDENDUM

DISTRICT COURT CAPTION

PLAINTIFFS' INTERROGATORIES

1. Please state the dates, times, locations of, and identify all persons who were present at each meeting of the Task Force.

2. For each Task Force member, please provide a description of the member's role in the preparation of the Report and the activities of the Task Force;

3. Please identify all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report.

4. For each person listed in response to Interrogatory 3, above, please provide:

a) A description of the person's role in the activities of the Task Force and in preparation of the Report.

b) A list of all meetings relating to the preparation of the Report and/or the activities of the Task Force in which the person participated, including the date and time of the meeting and identity of all persons who participated at the meeting.

5. Please list all federal agencies, offices, or other entities that participated, in any manner, in Task Force activities or preparation of the Report.

6. For each agency, office, or entity listed in response to Interrogatory 5, above, please:

a) Provide a description of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

b) Identify all persons who were involved with the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

i) For each person listed in response in Interrogatory 6(b), above, describe the person's role in of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

ii) For each person listed in response to Interrogatory 6(b), above, please provide a list of all meetings relating to the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report, in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting;

7. Please list all Sub-Groups that participated, in any manner, in the activities of the Task Force and/or the preparation of the Report.

8. For each Sub-Group listed in response to Interrogatory 7, above, please:

a) describe the role or function of the Sub-Group in the activities of the Task Force and/or the preparation of the Report;

b) identify all persons who participated in the activities of the Sub-Group;

c) list all meetings of the Sub-Group, including the date and time of the meeting and the identity of all Persons who participated at the meeting.

9. For each Person listed in response to Interrogatory 8(b), above, please:

a) Describe the person's role in the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s).

b) list all meetings relating to the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s), in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting.

PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.

2. All documents establishing or referring to any Sub-Group.

3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.

4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.

5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the Report, between any person (excluding full-time federal employees) and

(a) the Task Force;

(b) any member of the Task Force;

(c) any staff or personnel of the Task Force;

(e) any Sub-Groups.

(f) any members of any Sub-Groups

(g) any staff or personnel of any Sub-Groups.

6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person (excluding full-time federal employees) and

(a) the Department of Energy, or any employee or agent of the Department of Energy;

(b) the Department of Commerce, or any employee or agent of the Department of Commerce;

(c) the Department of Agriculture, or any employee or agent of the Department of Agriculture;

(d) the Department of Interior, or any employee or agent of the Department of Interior;

(e) the Department of Treasury, or any employee or agent of the Department of Treasury;

(f) the Department of Transportation, or any employee or agent of the Department of Transportation;

(g) the Environmental Protection Agency, or any employee or agent of the Environmental Protection Agency.

7. All documents concerning activities of the Task Force after September 30, 2001.

8. All documents concerning matters discussed in the Janaury 3, 2002 letter from David Addington, counsel to the Vice President, to Henry Waxman, including but not limited to the October 10, 2001 meeting between a Task

Force staff member and representatives of Enron Corporation.

Respectfully submitted,

Attorneys for the Plaintiffs